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Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test"

Christopher J. Cotnoir
University of Maine School of Law

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EMPLOYEES OR INDEPENDENT CONTRACTORS: A CALL FOR REVISION OF MAINE'S UNEMPLOYMENT COMPENSATION "ABC TEST"

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I. INTRODUCTION

The Maine Employment Security Law governs whether one person performing services for another is an independent contractor or an employee for unemployment tax purposes. It requires many employers to pay unemployment taxes on individuals who, under the usual common law rules governing the employer-employee relationship, are independent contractors. This result, caused partly by the structure of the statute and partly by judicial interpretation, has the effect of discouraging business expansion, limiting entrepreneurial opportunities, and ultimately, hampering statewide economic development.

This Comment first provides the historical background of unemployment compensation legislation at the federal and state levels. Employer liability and employee/independent contractor status are described, and judicial base lines for constitutionality and statutory construction are presented. Next, a detailed narrative on the Maine experience is presented, including statutory developments, executive-branch administration and adjudication, enforcement efforts and consequences, and judicial review.

This overview is followed by an analysis of present statutory and

case law. The analysis includes an evaluation of the effectiveness of the law in fulfilling the statutory purposes and an argument for reform in order to achieve those purposes without unnecessarily burdening Maine's economy. Specific proposals for revision of Maine Employment Security Law are presented.

After nearly sixty years' experience with unemployment compensation policies and programs, the State of Maine is in the midst of an economic crisis, recovery from which is hampered by the structure of the statute itself. Employers, those responsible for putting Maine people to work, are discouraged from contracting jobs out to "independent contractors" because of the uncertainty concerning employer liability for unemployment taxes. They put off business expansion and forego engaging the services of individual business operators in favor of larger firms. At the same time, entrepreneurial incentive is squelched as a result of businesses' reluctance to engage sole-proprietors for fear of later being called on to pay unemployment taxes for self-employed individuals, who will never file an unemployment benefits claim nor be eligible for benefits even if they did. The courts have been unable to break this cycle, and the legislature's efforts at piecemeal reparations has exacerbated the problem. One way to begin to address the issue is to redefine one of the fundamental principles of unemployment legislation: the definition of "employment" as it relates to the services provided by that staple of entrepreneurship—the independent contractor.

II. HISTORICAL BACKGROUND

A. *Enactment of Unemployment Compensation Legislation*

In response to the economic devastation of the Great Depression, Congress enacted the Federal Unemployment Tax Act (hereinafter "FUTA").¹ This legislation seeks to provide a source of income for unemployed individuals. The purpose of such legislation is to relieve the public generally of the economic burdens caused by unemployment.² FUTA shifts the burdens of unemployment from the general public and specific unemployed individuals to employers as a class,³ through the establishment of a tax, calculated as a percentage of wages paid to employees.⁴ The premise behind the enactment was that funds would be accumulated during times of economic prosperity and high employment and be held for future payments to individuals who later became unemployed during less favorable economic times. Thus, the legislation provides or maintains purchasing

1. 26 U.S.C. §§ 3301-3311 (1988).

2. 81 C.J.S. *Relief or Reduction of Involuntary Unemployment; Labor Disputes* § 149 (1977).

3. *Id.*

4. See 26 U.S.C. § 3301 (1988) (tax rate "imposed on every employer").

power for unemployed persons and stimulates the economy.

The federal enactment allows for a reduction in the federal tax of employers when the state has enacted its own unemployment compensation laws. This reduction applies where the state legislation has been approved by the Secretary of Labor as meeting certain minimum requirements⁵ and where the employer has timely paid amounts due to the established state accumulation funds.⁶ All fifty States, and Congress for the District of Columbia, have enacted unemployment compensation legislation (sometimes referred to as "employment security" laws).

B. Employer Liability Under the Law

Under the state statutes, certain employers must make contributions⁷ to the accumulation funds based on a percentage of wages paid to employees up to a specified ceiling.⁸ In most states, employees do not pay into the fund.⁹ The employers' contributions are simply an expense of doing business and having employees in that state. All employers who have achieved a threshold level of employment in the current or preceding calendar year must contribute to the accumulated funds. The thresholds vary from state to state and, within

5. Section 3304 of the Federal Unemployment Tax Act (FUTA) requires 16 conditions to be met before the Secretary's approval may be granted. Some of these include: all unemployment compensation shall be paid through public employment offices; all monies received in the unemployment fund shall be credited to the Unemployment Trust Fund; compensation shall not be denied to otherwise eligible individuals for refusing to accept new work due to a labor dispute, a substantial reduction in working conditions, or a requirement to join or fail to join a union; the state shall participate in an arrangement whereby wages earned in another state shall be combined with in-state earnings to determine the amount of compensation payable; no person shall be denied compensation solely on the basis of pregnancy or termination of pregnancy; information on the alien status of claimants shall be obtained and used in determining eligibility for compensation; and the amount of compensation otherwise payable shall be reduced (but not below zero) by the amount received by the individual from a pension, retirement, annuity, or similar periodic payment. 26 U.S.C. § 3304 (1988).

6. *Id.* § 3302.

7. "Contribution" is defined at 26 U.S.C. § 3306(g) (1988) as "payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ."

8. In Maine, employers pay contributions based on the first \$7,000 of wages paid to an employee. ME. REV. STAT. ANN. tit. 26, § 1043(19) (West 1988).

9. California, New Jersey, and Pennsylvania require employers to withhold from employees' wages a specified percentage (between 0.05% and 0.2%) for contribution to the unemployment and, or alternatively, disability funds. Employers who fail to make the required deductions are liable for the employees' contributions. See CAL. UNEMP. INS. CODE § 984 (West 1986); N.J. STAT. ANN. §§ 43:21-7(d); 43:21-7b(a) (West 1991 & Supp. 1994); PA. STAT. ANN. tit. 43, § 781.4 (Purdon 1992 & Supp. 1994-1995).

states, from industry to industry.¹⁰ In most states, employers must contribute whenever a payroll exceeds a minimum amount during a particular period (usually a calendar quarter) or when a minimum number of individuals have been employed over the course of a calendar year.

Generally, once liability is established, an employer is required to file periodic reports that list the names and social security numbers of the workers and wages paid to each during the period. The employer calculates the contributions due as a percentage of the wages paid up to the ceiling for each individual. The appropriate regulatory body may assess interest and penalty charges for late filing of returns and late payment of amounts due.¹¹

C. *Employees*

FUTA defines the term "employee" with reference to section 3121(d) of the Federal Insurance Contributions Act (hereinafter "FICA").¹² Under FICA, "employee," as distinguished from "independent contractor," means a corporate officer and "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee."¹³ The Internal Revenue Service has promulgated regulations pursuant to both the FICA and the FUTA definitions of "employee."¹⁴ These definitions set forth several factors which signal an employer-employee relationship. Among the factors to consider are the employer's right to discharge the worker, the furnishing of tools, and the provision of a place to work.¹⁵ The overriding factor is whether "the person for whom the services are performed has the right to

10. Under 26 U.S.C. § 3306(a)(1) (1988), the threshold for general employers is \$1,500 or more paid in wages in any calendar quarter *or* at least one individual employed for some part of a day in each of 20 different weeks in a calendar year. The threshold for agricultural employers, under 26 U.S.C. § 3306 (a)(2) (1988), is \$20,000 or more paid in wages in any calendar quarter *or* at least 10 individuals employed for some part of a day in each of 20 different weeks during a calendar year. For domestic employers, under 26 U.S.C. § 3306(a)(3) (1988), the threshold is \$1,000 or more paid in wages during any calendar quarter. Maine generally follows the federal thresholds. ME. REV. STAT. ANN. tit. 26, §§ 1043(9)(A-1), 1043(9)(J), 1043(9)(K) (West 1988 & Supp. 1993-1994). Other states, Alaska, for example, establish liability for employers immediately upon hiring the first employee. ALASKA STAT. § 23.21.520(10)(1990).

11. See, e.g., ME. REV. STAT. ANN. tit. 26, §§ 1081(13), 1221(1)-(2), 1225(3)-(4) (West 1988 & Supp. 1993-1994). See also the Unemployment Ins. Comm'n, Rules Governing the Administration of the Employment Security Law, Chapter 2 (Aug. 16, 1993), for the reporting and payment scheme for Maine.

12. 26 U.S.C. § 3306(i) (1988) (stating that for FUTA purposes, "employee" has the meaning assigned to such term by § 3121(d), except that paragraph (4) and subparagraphs (B) and (C) of paragraph (3) shall not apply).

13. 26 U.S.C. § 3121(d)(1), (2) (1988).

14. 26 C.F.R. §§ 31.3121(d)-1, 31.3306(i)-1 (1993).

15. 26 C.F.R. § 31.3306(i)-1(b) (1993).

control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished."¹⁶ If the worker falls within the definition of "employee," it is immaterial that the parties may designate a different term, such as partner, coadventurer, agent, or independent contractor.¹⁷

Most state statutes do not define the term "employee." Rather, the statutes define which services constitute "employment." Often, "employment" is defined in broad terms (e.g., any service performed for remuneration or under any contract of hire, written or oral, express or implied).¹⁸ Specific exceptions are set forth only for certain types of services. The provisions defining "employment" place the burden on employers to show that the services at issue are not considered "employment" on which contributions must be paid. Such provisions are commonly known as "ABC Tests" since, under these provisions, there are three prongs that must be met. The following is a typical example of an ABC Test:

Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the bureau that:

- (1) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact;
- (2) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (3) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.¹⁹

D. Statutory Construction

Courts differ in deciding whether unemployment compensation legislation, generally, should be broadly or narrowly construed as to coverage of "employees."²⁰ Some courts have said that such legislation is remedial in nature and, therefore, should be given a liberal

16. *Id.*

17. 26 C.F.R. § 3306(i)-1(d) (1993).

18. See, e.g., ME. REV. STAT. ANN. tit. 26, § 1043(11) (West 1988 & Supp. 1993-1994).

19. See ME. REV. STAT. ANN. tit. 26, § 1043(11)(E) (West 1988 & Supp. 1993-1994).

20. See Annotation, *Determination of Employer-Employee Relationship for Social Security and Unemployment Tax Purposes Under § 3121(d)(2) of Federal Insurance Contributions Act 26 USCS § 3121(d)(2), § 3306(i) of Federal Unemployment Tax Act 26 USCS § 3306(i), and Implementing Regulations* (hereinafter *Employer-Employee Relationship*). 37 A.L.R. FED. 95, 108 (1978).

construction.²¹ Those courts that favor "liberal" construction, however, take care to warn that such a construction should not alter the policy or purposes sought to be achieved by the legislation.²² Other courts have determined that the legislation should be strictly construed since it is in derogation of the common law²³ or because it is taxation legislation.²⁴

Generally, courts favoring strict construction have determined that the common law distinction between "independent contractors" and "employees" continues in spite of the presence in the statute of an ABC Test.²⁵ According to this view, if an individual was an independent contractor before enactment of the legislation, he or she would continue to be an independent contractor. Such a court would refuse to apply the ABC Test in that case.²⁶ On the other hand, courts favoring broad statutory construction tend to rely on the definitions in the legislation as "a carefully considered and deliberate purpose to leap many legal barriers . . . [and as] a studied effort to sweep beyond and to include, by re-definition, many individuals who would have been otherwise excluded from the benefits of the Act by the former concepts of master and servant . . . recognized at common law."²⁷ In *Hasco Manufacturing Co. v. Maine Employment Security Commission*,²⁸ the Maine Supreme Judicial Court, sitting as the Law Court, observed that the ABC Test brings under the definition of employment more relationships than those governed by the common law of master and servant.²⁹ The court plainly held that "[t]he common law rules relating to master and servant do not gov-

21. See, e.g., *Stewart v. Maine Employment Sec. Comm'n*, 152 Me. 114, 120, 125 A.2d 83, 86 (1956); *Rochester Dairy Co. v. Christgau*, 14 N.W.2d 780, 783 (Minn. 1944).

22. See, e.g., *Rochester Dairy Co. v. Christgau*, 14 N.W.2d at 783 (stating there are limits beyond which remedial purpose of statute cannot be carried by judicial interpretation); *Toothaker v. Maine Employment Sec. Comm'n*, 217 A.2d 203, 210 (Me. 1966) ("We must take care that we do not alter or change the policy of the law in the process of construction.").

23. See *Florida Indus. Comm'n v. State*, 21 So. 2d 599, 602 (Fla. 1945).

24. Cf. *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *Howes Bros. Co. v. Massachusetts Unemployment Compensation Comm'n*, 5 N.E.2d 720 (Mass. 1936).

25. *A.J. Meyer & Co. v. Unemployment Compensation Comm'n*, 152 S.W.2d 184, 189 (Mo. 1941) (quoting *Wisconsin Bridge & Iron Co. v. Ramsay*, 290 N.W.2d 199, 202 (Wis. 1940) and *Hill Hotel Co. v. Kinney*, 295 N.W.2d 397, 398 (Neb. 1940)).

26. *Florida Industrial Comm'n*, 21 So. 2d at 603, 604 (Fla. 1945); *Rochester Dairy Co. v. Christgau*, 14 N.W.2d 780, 783 (Minn. 1944).

27. *Unemployment Compensation Comm'n v. Jefferson Standard Life Ins. Co.*, 2 S.E.2d 584, 589 (N.C. 1939). See also *Life & Casualty Ins. Co. v. Unemployment Compensation Comm'n*, 16 S.E.2d 357, 361 (Va. 1941) ("[W]e are bound by the statutory definition of [employment] rather than by the common law meaning of the master and servant relation.").

28. 158 Me. 413, 185 A.2d 442 (1962).

29. *Id.* at 443.

ern the meaning of the statutes."³⁰

Federal courts construing the FUTA have interpreted Congressional intent as importing the common law principles of master and servant into the statute.³¹ The FUTA contains no ABC Test, however, and over the years, the lower federal courts developed widely divergent views as to the standard for determining when workers were employees for FICA and FUTA purposes.³² In 1947, the United States Supreme Court attempted to clarify the standard.³³ The Court stated that "employees are those who as a matter of economic reality are dependent upon the business to which they render service."³⁴ Before the federal administrative agencies could promulgate new regulations embodying this "economic reality" test, Congress passed a joint resolution³⁵ which disapproved the one-facet test and reiterated its intention that the traditional legal tests defining the employer-employee relationship for various occupations should continue to be applied.³⁶ The result of the decisions and the resolution has been a reliance on ad hoc determinations.³⁷ In every case, however, the burden rests on the employer to show that each worker meets each prong of the ABC Test in order to avoid liability for unemployment contributions.³⁸

30. *Id.* See also *State v. Stevens*, 77 A.2d 844, 847 (Vt. 1951) ("statute contains no mention of the terms 'master,' 'servant' or 'independent contractor.'").

31. In *Jones v. Goodson*, 121 F.2d 176 (10th Cir. 1941), the court stated:

It must be presumed that Congress was cognizant of these well established principles at the time of the enactment of the statute, and that if different guides were intended for ascertaining whether the relationship of employer and employee existed between parties in the application of the statute, appropriate language would have been used to indicate that purpose. There is nothing in the act or its legislative history which indicates such an intent. Furthermore, the regulation adverted to blue prints with meticulous care the elements of the relationship in strict harmony with uniform judicial pronouncements. Congress has convened several times since the regulation was promulgated and has not evidenced its disapproval in any manner.

That acquiescence must be construed as approval.

Id. at 180.

32. 37 A.L.R. FED. 95, 108 (citations omitted).

33. *Bartels v. Birmingham*, 332 U.S. 126 (1947); *United States v. Silk*, 331 U.S. 704 (1947).

34. *Bartels v. Birmingham*, 332 U.S. at 130.

35. H.J. Res. 296, 80th Cong., 2d Sess., 62 Stat. 438 (1948).

36. See *United States v. W.M. Webb, Inc.*, 397 U.S. 179, *cert. denied*, 400 U.S. 902 (1970).

37. See, e.g., *Nyer v. Maine Unemployment Ins. Comm'n*, 601 A.2d 626, 627 (Me. 1992); *Gerber Dental Ctr. v. Maine Unemployment Ins. Comm'n*, 531 A.2d 1262, 1263 (Me. 1987).

38. See, e.g., *Hasco Mfg. Co. v. Maine Employment Sec. Comm'n*, 158 Me. 413, 415, 185 A.2d 442, 443 (1962). See also *Nyer v. Maine Unemployment Ins. Comm'n*, 601 A.2d at 627.

II. THE MAINE EXPERIENCE

A. *Scope of Coverage*

When Maine first enacted the Maine Employment Security Law in 1935,³⁹ general employer liability was limited to those employers with eight or more workers performing services "for some portion of a day, but not necessarily simultaneously, in each of 20 different weeks, whether or not such weeks are or were consecutive, within either the current or preceding calendar year . . ."⁴⁰ The Law Court rejected facial challenges to the statute's constitutionality under the Equal Protection Clauses of the United States and Maine Constitutions. The Law Court upheld the so-called "rule of eight" liability threshold as not offensive to either constitution.⁴¹

B. *Legislative Exemptions Enacted*

Partly as a result of revisions in the federal legislation, partly in response to individual case decisions, and partly due to special-interest lobbying, the Maine Legislature has often amended the Maine Employment Security Law. The liability threshold for general employers has been lowered.⁴² In addition, the court's application of the ABC Test to various employment situations, thereby increasing the coverage of the law, sparked legislation exempting certain types of employment.⁴³

39. P.L. 1935, ch. 192; now ME. REV. STAT. ANN. tit. 26, §§ 1041-1251 (1988 & Supp. 1992-1993).

40. P.L. 1935, ch. 192, § 19(f)(1).

41. *Maine Unemployment Compensation Comm'n v. Androscoggin Junior, Inc.*, 137 Me. 154, 160, 16 A.2d 252, 256 (1940) (finding no improper classification between new companies employing workers to construct the physical plant and older companies not employing such workers and between companies with less than eight employees and those with eight or more employees). In that decision, the Law Court quoted from *Maine v. King*, 135 Me. 5, 188 A. 775 (1936):

It must be borne in mind that discrimination alone is not sufficient to render the act unconstitutional under the Fourteenth Amendment. In order to void it, its provisions must . . . create a discrimination, unwarranted by actual differences, so that the statute is purely arbitrary and effects legislation which unreasonably and without proper distinction favors some persons or classes over others in like circumstances.

135 Me. at 19, 188 A. at 783. The *Androscoggin Junior* court found the challenged classification to be neither arbitrary, unreasonable, nor unjust. *Maine Unemployment Compensation Comm'n v. Androscoggin Junior, Inc.*, 137 Me. at 134, 16 A.2d at 256.

42. The "rule of eight" was repealed in 1979, P.L. 1979, ch. 541, § 175, and under ME. REV. STAT. ANN. tit. 26, § 1043(9)(A-1) (West 1988), general employer liability is established when an employer either pays wages of \$1,500 or more in any calendar quarter or has in employment one or more individuals for some part of a day in each of 20 different weeks during a calendar year.

43. See, e.g., ME. REV. STAT. ANN. tit. 26, § 1043(11)(F)(35) (West 1988), passed in 1985 in response to *Jose v. Maine Dep't of Labor*, No. CV-84-351 (Me. Super. Ct., Ken. Cty., May 20, 1985) (Clifford, J.). This statutory provision exempts from coverage homeworkers in the knitted outwear industry.

The Maine Employment Security Law exempts from coverage at least thirty-seven different types of employment. These classifications include: agricultural labor below a relatively high threshold level,⁴⁴ domestic services below a different threshold level,⁴⁵ services performed by one in the employ of his or her son, daughter, or spouse, as well as services performed by a child under age eighteen in the employ of his or her parent,⁴⁶ services performed in the employ of a foreign government,⁴⁷ services performed by real estate or insurance brokers or agents paid solely on a commission basis,⁴⁸ services performed by hairdressers or barbers who hold booth licenses and who operate under a booth or other rental agreement,⁴⁹ newspaper delivery services paid by commission,⁵⁰ and services performed by full-time students who work for less than thirteen calendar weeks in the employ of an organized camp that did not operate for more than seven months in a calendar year or that earned less than one-third of its gross receipts during any six months of a calendar year.⁵¹ These exemptions do not alter the specific presumption of employment in the ABC Test. Rather, they remove certain specific services from coverage under the statute *notwithstanding* the results of an application of the ABC Test.

One of the primary reasons for enacting specific exemptions, especially after a court decision finding employer liability for contributions in a particular case, is the legislature's perception of inequity where an employer must pay contributions on behalf of workers who, for one reason or another, will not be able to receive unemployment compensation benefits. For example, in 1987 the Maine Legislature exempted from the definition of "employment" services by certain full-time students performed for certain organized camps.⁵² Although the 113th Maine Legislature passed the exemption to bring the Maine Employment Security Law into conformity with the FUTA, and not in reaction to a specific court decision, the bill proposing the exemption contained the following specific finding of fact: "The federal law exempts from employment the services performed by the students because they are normally not eligible for unem-

44. ME. REV. STAT. ANN. tit. 26, § 1043(11)(A-2), (11)(F)(4) (West 1988).

45. *Id.* § 1043(11)(A-3), (11)(F)(5).

46. *Id.* § 1043(11)(F)(6).

47. *Id.* § 1043(11)(F)(16).

48. *Id.* § 1043(11)(F)(19).

49. *Id.* § 1043(11)(F)(29), (11)(F)(30).

50. *Id.* § 1043(11)(F)(34).

51. *Id.* § 1043(11)(F)(36). "Organized camp" is not defined either in the Maine statute or in the FUTA, after which the Maine exemption was patterned (26 U.S.C. § 3306(c)(20) (1988)). *But see* Me. Unemployment Ins. Comm'n, No. 92-E-29 (Dec. 23, 1992) (finding family recreational camp was "sufficiently organized" so as to come within the statutory exemption).

52. ME. REV. STAT. ANN. tit. 26, § 1043(11)(F)(36) (West 1988).

ployment benefits."⁵³

The legislature enacted a similar exemption for homeworkers⁵⁴ following a decision of the Kennebec County Superior Court.⁵⁵ Because these workers, by and large, were mothers of young children who could not enter the traditional labor pool due to child care responsibilities, they were not eligible to receive unemployment compensation benefits for failure to meet the "able and available" eligibility criteria.⁵⁶ In response to this seeming inequity, political pressures were exerted by the employers, who threatened to go out of business if contributions on behalf of homeworkers were required, and by the workers themselves, who saw their services as an opportunity for an income supplement rather than as a basis upon which future unemployment benefits would be paid. The legislature responded and simply by-passed application of the ABC Test through the statutory exemption.⁵⁷

C. Administration

1. Maine Department of Labor

An examination of the administrative policies and procedures regarding the ABC Test provides important insight into unemployment compensation in Maine, especially as to the administrative burdens employers face in attempting to reverse a finding of "employment." Maine's unemployment compensation law charges an executive-branch agency with administration and enforcement of the statute.⁵⁸ The Maine Department of Labor (hereinafter "the Department") is the responsible administrative body.⁵⁹ The Unemployment Compensation Tax Division of the Department's Bureau of Employment Security (hereinafter "the Bureau") is responsible for determining employer liability. Field personnel contact employers, ex-

53. L.D. 142, Statement of Fact (113th Legis. 1987).

54. ME. REV. STAT. ANN. tit. 26, § 1043(11)(F)(35) (West 1988).

55. *Blueberry Woolens/Harrowoolens, Inc. v. Maine Unemployment Ins. Comm'n*, CV-84-350 (Me. Super. Ct., Ken. Cty., May 20, 1985) (Clifford, J.); *Jose v. Maine Dep't of Labor*, No. CV-84-351 (Me. Super. Ct., Ken. Cty., May 20, 1985) (Clifford, J.).

56. ME. REV. STAT. ANN. tit. 26, § 1192(3) (West 1988).

57. Much of the Author's understanding of this legislative history and rationale is based on his knowledge and involvement with these specific cases and controversies while he held the position of Field Advisor & Examiner with the Maine Department of Labor and represented the Bureau of Employment Security at the administrative hearing before the Maine Unemployment Insurance Commission (MUIC). The Bureau's position that the homeworkers' services did not satisfy the three prongs of the ABC Test was upheld by the MUIC and affirmed on appeal to the Superior Court. The legislature enacted the home-knitter exemption while an appeal to the Maine Law Court was pending. Upon enactment of the exemption, the Law Court appeal was withdrawn.

58. See ME. REV. STAT. ANN. tit. 26, §§ 1081-1083 (West 1988).

59. *Id.* § 1082(1).

plain the requirements of the Employment Security Law, examine employer records to determine liability, and enforce collection of amounts assessed. A primary task of the field personnel is to investigate individual claims of employment and to apply the ABC Test in evaluating whether the employment situation under review is subject to contributions.

2. Appeals

When the Department's field personnel make a determination based on an application of the ABC Test to particular services performed for remuneration, the party against whom the determination was made (the employer when liability is found; the employee when no coverage is found) may appeal the determination⁶⁰ to the Maine Unemployment Insurance Commission (hereinafter "MUIC").⁶¹ This appellant bears the burden of presenting evidence and persuading the MUIC that the determination of the Bureau was in error. Specifically, under Maine's ABC Test, an employer who appeals a decision of the Department must rebut the presumption of employment⁶² by showing that each prong of the ABC Test is satisfied. Failure to prove any prong will result in liability.⁶³

Under the first prong of the ABC Test, the MUIC evaluates whether the services at issue are performed free from the employer's ability to direct and control the services.⁶⁴ The critical question is

60. Often, the application of the ABC Test occurs during an audit of the employer's records when it is found that the employer failed to make contributions for certain services performed for it for remuneration because the employer believed that the worker was an independent contractor. The workers themselves frequently agree to perform as independent contractors and believe they are, in fact, independent. Thus, appeals initiated by these workers, when no coverage is found, are rare.

61. The MUIC is composed of three persons appointed by the Governor to staggered six-year terms. The chairman, who must be an attorney admitted to the practice of law in the state, represents the general public. The other two members are appointed as representatives of employers and of labor, respectively. ME. REV. STAT. ANN. tit. 26, § 1081(1) (West 1988).

62. Under ME. REV. STAT. ANN. tit. 26, § 1043(11) (West 1988), "employment" includes "service performed . . . for wages or under any contract of hire, written or oral, expressed or implied." Under ME. REV. STAT. ANN. tit. 26, § 1043(11)(E) (West 1988), "[s]ervices performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown" that the three prongs of the ABC Test are satisfied. Taken together, the Maine Law Court has observed that the statute "defines employment in terms sufficiently broad to include presumptively any '[s]ervices performed by an individual for remuneration.'" See also *Nyer v. Maine Unemployment Ins. Comm'n*, 601 A.2d 626, 627 (Me. 1992) (quoting *Gerber Dental Ctr. Corp. v. Maine Unemployment Ins. Comm'n*, 531 A.2d 1262, 1263 (Me. 1987)).

63. See *Gerber Dental Ctr. Corp. v. Maine Unemployment Ins. Comm'n*, 531 A.2d at 1263.

64. ME. REV. STAT. ANN. tit. 26, § 1043(11)(E)(1) (West 1988). This is the "A" prong (ability to direct and control).

not whether the employer actually exercised control, but whether the employer had the right to do so.⁶⁵ It is generally considered well-settled that such control must go beyond merely ensuring the desired result. It must also include the right to control the method or means of accomplishing the result.⁶⁶

Some of the relevant factors relied on by the MUIC in this context include whether the worker must adhere to a time schedule set by the employer, the employer's unilateral action in setting the rate of pay, and the employer's provision of training to the worker.⁶⁷ The degree of control contemplated by the statute has been found in situations where employers exercise control over price, form of contract, acceptance of orders, terms of sale, noncompetition, remission of payments, right to discharge, furnishing of leads, and complaint procedures.⁶⁸

In order to meet the requirements of the second prong of the ABC Test, the employer must show either that the worker's services are outside the employer's usual course of business or that the services are performed by the worker outside all of the employer's places of business.⁶⁹ The "place of business" alternative includes an employer's business territory⁷⁰ and may also include individual job sites or places of installation.⁷¹ Thus, to the extent that a particular worker is an "employee," wherever he or she performs services may be considered an extension of the employer's place of business.⁷²

The Maine case law focusing on the "course of business" alternative is sparse. In *Maine Unemployment Compensation Commission*

65. *Hasco Mfg. Co. v. Maine Employment Sec. Comm'n*, 158 Me. 413, 418, 185 A.2d 442, 445 (Me. 1962) ("Control contemplated by the statute is general control and the right to control may be sufficient even though it is not exercised.").

66. See *American Consulting Corp. v. United States*, 454 F.2d 473, 478-79 (3d Cir. 1971); *Lifetime Siding, Inc. v. United States*, 359 F.2d 657, 660 (2d Cir.), cert. denied, 385 U.S. 921 (1966); *Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216 (Ct. Cl. 1965).

67. See Me. Unemployment Ins. Comm'n, No. 91-E-100 (Aug. 31, 1992).

68. *Ross v. Cummins*, 131 N.E.2d 521, 524 (Ill. 1956). See also *Hasco Mfg. Co. v. Maine Employment Sec. Comm'n*, 158 Me. at 418, 185 A.2d at 444-45; Me. Unemployment Ins. Comm'n No. 92-E-205 (Aug. 13, 1993).

69. ME. REV. STAT. ANN. tit. 26, § 1043(11)(E)(2) (West 1988). This is the "B" prong (business course/place).

70. *Guy Gannett Publishing Co. v. Maine Employment Sec. Comm'n*, No. CV-81-859 (Me. Super. Ct., Cum. Cty., July 25, 1983) (Alexander, J.).

71. See *Seacoast Drywall & Partition v. Maine Employment Sec. Comm'n*, No. CV-83-271 (Me. Super. Ct., York Cty., Jan. 4, 1984) (Brodrick, J.).

72. In *Jose v. Maine Dep't of Labor*, No. CV-84-351 (Me. Super. Ct., Ken. Cty., May 20, 1985) (Clifford, J.), and its companion case, *Blueberry Woolens/Harrowoolens, Inc. v. Maine Unemployment Ins. Comm'n*, No. CV-84-350 (Me. Super. Ct., Ken. Cty., May 20, 1985) (Clifford, J.), the MUIC's finding that the home-knitters' homes were an extension of the employers' places of business was not disturbed by the court on appeal.

v. Maine Savings Bank,⁷³ the Law Court held that the services performed to repair, improve, and alter real estate acquired by the bank through foreclosures were outside of the bank's usual course of business. The court reached this result notwithstanding statutory authorization for the bank to hold and maintain real estate acquired through the foreclosure of mortgages thereon.⁷⁴ The Law Court distinguished *Maine Savings Bank in Maine Unemployment Compensation Commission v. Androscoggin Junior, Inc.*,⁷⁵ holding that similar repair and maintenance services performed on rental properties owned and operated by the employer were not outside its usual course of business.⁷⁶ The court stated that the services contracted by Maine Savings were "merely incidental to the banking business."⁷⁷ The same services contracted by Androscoggin Junior, on the other hand, were part of the usual business of owning and letting tenement houses.⁷⁸

Today, the MUIC weighs several factors in determining whether services meet the "business course/place" prong of the ABC Test. Among these factors are the type of services being performed as compared to the type of business the employer is engaged in, whether the employer maintains a presence on the job site, and whether the employer maintains several business locations or a specified business territory.⁷⁹

The third prong of the ABC Test is whether an individual "is customarily engaged in an independently established trade, occupation, profession, or business."⁸⁰ To satisfy this prong of the test, the employer must show that the individual whose services are at issue "had a proprietary interest in an occupation or business to the extent that he could operate without hindrance from any source."⁸¹ To this end, "such workers must hold themselves out to some community of potential customers as independent tradesmen involved in a particular craft."⁸² Factors considered by the MUIC in evaluating an individual's customary independence include whether the worker maintains a separate business location, has employees, is free to accept outside work, may sustain profits or losses in the performance of the services at issue, and holds himself or herself out to the public

73. 136 Me. 136, 3 A.2d 897 (1939).

74. *Id.* at 898-99.

75. 137 Me. 154, 16 A.2d 252 (1940).

76. *Id.* at 258.

77. *Id.*

78. *Id.*

79. *See* Me. Unemployment Ins. Comm'n No. 92-E-205 (Aug. 13, 1993).

80. ME. REV. STAT. ANN. tit. 26, § 1043(11)(E)(3) (West 1988).

81. *Hasco Manufacturing Co. v. Maine Employment Sec. Comm'n*, 158 Me. 413, 419, 185 A.2d 442, 445 (Me. 1962) (citing *Murphy v. Daumit*, 56 N.E.2d 800 (1944)).

82. *Nyer v. Maine Unemployment Ins. Comm'n*, 601 A.2d 626, 628 (Me. 1992) (footnote omitted).

as a separate business.⁸³

In all cases where the services are performed under a written contract, the terms of the contract are considered relevant. Application of the ABC Test, however, is more concerned with what happens in fact.⁸⁴ If the contract is no more than an attempt to use the "independent contractor" label to avoid liability for unemployment contributions, the court will disregard the contract, and the actual practice of the parties governs the application of the ABC Test.⁸⁵

3. *Enforcement*

The MUIC has ruled that it must apply *stare decisis* to its decision processes in order to ensure predictability and consistency among factually similar cases.⁸⁶ Thus, the decisions of the courts will guide the MUIC in its decisions. MUIC decisions, in turn, will guide the Bureau and its field personnel in their day-to-day applications of the ABC Test and in the nature and content of the information and advice provided to employers and prospective employers.

The existence and application of the ABC Test has a disproportionate impact in certain industries, as well as particular occupations within those industries. The insurance industry, for example, was affected after court decisions held that agents paid by commission were covered under the statute.⁸⁷ The resulting increase in the employers' overhead expenses sparked a lobbying effort that succeeded in the enactment of a specific exemption from coverage under the FUTA of insurance agents paid solely by way of commissions.⁸⁸ Although the Maine statute need not conform to the FUTA in all respects, the Maine Legislature enacted an exemption similar to the FUTA exemption⁸⁹ and, in 1967, included real estate agents and brokers paid solely by way of commissions within the exemption.⁹⁰

The ABC Test has also greatly affected the construction industry. Because of that industry's reliance on "contract" and "subcontract"

83. Me. Form FX-8.1, Questionnaire Regarding Employment Relationship with Worker (Maine Dep't of Labor).

84. See ME. REV. STAT. ANN. tit. 26, § 1043(11)(E)(1) (West 1988) ("Such individual has been and will continue to be free from control . . . both under his contract of service and in fact . . ."). See also *Hasco Manufacturing Co. v. Maine Employment Sec. Comm'n*, 158 Me. at 417, 185 A.2d at 444-45 (contract designating salesmen as "independent contractors" found not to be controlling and "no more than a subterfuge designed unsuccessfully to escape" a finding of employment).

85. See *Employer-Employee Relationship* 37 A.L.R. FED. 95, 111 (1978).

86. Me. Unemployment Ins. Comm'n, No. 92-C-03066 (July 27, 1992).

87. *Industrial Comm'n v. Northwestern Mutual Life Ins. Co.*, 88 P.2d 560 (Colo. 1939); *Unemployment Compensation Comm'n v. Jefferson Standard Life Ins. Co.*, 2 S.E.2d 584 (N.C. 1939).

88. 26 U.S.C. § 3306(c)(14) (1988).

89. ME. REV. STAT. ANN. tit. 26, § 1043(11)(F)(19) (West 1988).

90. P.L. 1967, ch. 294.

labor, employers in the industry have been found liable for the payment of contributions on amounts paid to workers who were initially hired as "independent contractors."⁹¹ These determinations have often come after the employers have operated in the same manner for years, and the findings of covered employment have resulted in assessments to the employers for substantial amounts. Occasionally, these assessments force the employer to cease operations, or to decide not to hire any workers in the future.⁹²

Legislative amendments and the ABC Test have also affected the employment of domestic labor. In 1976, the FUTA was amended so that only domestic services for which less than \$1,000 in wages were paid in the aggregate in any calendar quarter remained exempt.⁹³ The Maine Legislature adopted the FUTA change with respect to domestic services.⁹⁴ The legislature did not, however, provide any guidance for applying the ABC Test to such services,⁹⁵ and the

91. See, e.g., *Maine Unemployment Compensation Comm'n v. Androscoggin Junior, Inc.*, 137 Me. 154, 16 A.2d 252 (1940) (workers on original construction of plant were covered "employees" along with workers in plant's subsequent operation); *Nyer v. Maine Unemployment Ins. Comm'n*, 601 A.2d 626 (Me. 1992) (aluminum siding applicators under contract with manufacturer were covered "employees"); *Me. Unemployment Ins. Comm'n, No. 93-E-134* (July 1, 1993) (worker hired to do minor carpentry and other repairs on rental properties of real estate management firm found to be covered "employee" notwithstanding worker's representation of himself to employer as "independent contractor"). But see *Maine Unemployment Compensation Comm'n v. Maine Savings Bank*, 136 Me. 136, 3 A.2d 897 (1939) (worker hired to make repairs, improvements, and alterations to real estate parcels foreclosed by bank was not covered "employee").

92. In the construction trades, methods of operation vary to such an extent and individuals enter and leave the construction work force with such frequency and for so many reason (e.g., injury, stability in other fields, seasonal nature of work) that developing and sustaining a cohesive long-term political presence is nearly impossible. Thus, the industry has been unsuccessful in lobbying for the enactment of specific statutory exemptions. Also, because of the volatility of the demand for construction labor, it is highly questionable whether such a specific, across-the-board exemption would be wise. Certain workers may never wish to be independent tradespersons, and it would be inappropriate to remove them from the coverage of the Employment Security Law. On the other hand, an individual may consciously remove himself or herself from the labor force and attempt to establish an independent business as a drywall, for example. That person may initially be successful, but due to unforeseen factors, or due to inefficiency or poor decision-making, that person may fail in his or her attempt. It is equally inappropriate to permit that self-employed person to place himself or herself onto the unemployment rolls without first re-entering the regular labor force and establishing himself or herself as an "employee" and not an independent contractor.

93. Pub. L. No. 94-566, § 113(a), 90 Stat. 2667 (1976).

94. ME. REV. STAT. ANN. tit. 26, §§ 1043(11)(A-3), 1043(11)(F)(5) (West 1988), as amended by P.L. 1977, ch. 570.

95. The terms of the ABC Test are structured to facilitate application to services performed for a commercial enterprise (e.g., ME. REV. STAT. ANN. tit. 26, § 1043(11)(E)(2) (West 1988) discusses "usual course of the business for which such service is performed" and "all the places of business of the enterprise for which such

Maine courts have not had occasion to consider the ABC Test's applicability to domestic services. Still, the MUIC must continue to address the issue without legislative or judicial guidance.⁹⁶

D. Judicial Review

The Maine courts have generally deferred to MUIC decisions, with respect to both statutory interpretation and application. MUIC findings of fact are conclusive if supported by any credible evidence,⁹⁷ and the courts' review is confined to matters of law.⁹⁸ In some cases, the courts have set forth the relevant factors to be considered, the proper legal standard to be applied, the burden of proof, and the relevant interests to be examined.⁹⁹ In addition, the judicial view of legislative intent has affected the level of deference afforded decisions of the MUIC by courts.¹⁰⁰

The courts' deference to MUIC findings presents difficulty for employers. Already subject to the burdens of rebutting the presumption of employment¹⁰¹ and of meeting each prong of the ABC Test,¹⁰² employers may be unable to determine all the relevant considerations that will help them meet their burdens. The courts' def-

service is performed"). But for domestic services, the terms "usual course of business," and "places of business of the enterprise" are not easily definable. The legislature defined "domestic service," ME. REV. STAT. ANN. tit. 26, § 1043(27) (West 1988), in its 1977 amendment (P.L. 1977, ch. 570) as distinct from services as an employee in the pursuit of an employer's trade, occupation, profession, enterprise, or vocation. But nothing in the statute obviates application of the ABC Test to domestic services.

96. See Me. Unemployment Ins. Comm'n, No. 92-E-127 (Mar. 22, 1993) (employer did not argue non-applicability of ABC Test to domestic services, and MUIC assumed without deciding that test was applicable).

97. Guy Gannett Publishing Co. v. Maine Employment Sec. Comm'n, 317 A.2d 183, 185 (Me. 1974) (quoting DuBois v. Maine Employment Sec. Comm'n, 150 Me. 494, 505, 114 A.2d 359, 365 (1955) ("The Commission's findings of fact, when supported by any credible evidence, are conclusive.")).

98. See Guy Gannett Publishing Co. v. Maine Employment Sec. Comm'n, 317 A.2d at 185; Cornwall Industries v. Maine Dep't of Manpower Affairs, Employment Sec. Comm'n, 351 A.2d 546, 548 (Me. 1976).

99. See, e.g., Stewart v. Maine Employment Sec. Comm'n, 152 Me. 114, 125 A.2d 83 (1956) (listing relevant factors to consider when evaluating successorships); Hasco Mfg. Co. v. Maine Employment Sec. Comm'n, 158 Me. 413, 185 A.2d 442 (1962) (upholding MUIC application of ABC Test and providing factors as to all three prongs of test); Moore v. Maine Dep't of Manpower Affairs, etc., 388 A.2d 516 (Me. 1978) (remanding case for additional findings of fact and providing instructive legal standard for determining when discharge of employee was due to employee's misconduct).

100. See Hasco Mfg. Co. v. Maine Employment Sec. Comm'n, 158 Me. at 418-19, 185 A.2d at 445 (1962) (ABC Test intended to expand common law definition of master and servant to include other services in employment); Ham v. Maine Employment Sec. Comm'n, 216 A.2d 866, 867 (Me. 1966) (unemployment compensation law not intended to cover self-employed persons, and good cause for voluntarily quitting intended only to be cause which is attributable to the employment).

101. See *supra* note 65.

102. See *supra* note 66.

erence to the MUIC often results in opinions drafted in conclusory terms. In addition, there is no reporter system for MUIC decisions so that similar prior cases may be examined. The employers, therefore, are left to study those few appellate decisions that do provide instruction. Even those cases are often sufficiently different factually to offer little, if any, guidance. Many employers resort to equitable arguments inconsistent with the plain language of the statutes under which the MUIC must operate.¹⁰³ Alternatively, they may urge a new interpretation of a particular statutory provision without the opportunity to know that the MUIC has recently declined such an invitation.¹⁰⁴ Moreover, obtaining legal representation for these employers is often futile since there is no reporting system for MUIC decisions, and expertise in the field is not abundant. Finally, the expert advice that is available primarily resides with the Department of Labor's field personnel; and employers challenging determinations made by these personnel understandably have little incentive to seek help from them. As a result, employers may be faced with the alternatives of limiting the expansion of their businesses in order to avoid liability altogether, or of incurring substantial expenses for contributions (and sometimes interest and penalty charges) for failing to interpret properly and apply the ABC Test to their workers.

IV. THE NEED FOR REFORM

The MUIC has recently tended to decide many ABC Test cases in order to make it easier for employers to meet the requirements of the Test. Noting the present depressed economy, at least one member of the MUIC believes it is self-defeating to require an employer to make substantial contributions in order to employ an otherwise unemployed person when the effect may be to force the employer to forego hiring and thus forestall business expansion, leaving the worker unemployed.¹⁰⁵ A finding of no "employment" frees the employer from the expense of contributions and allows him or her to put an otherwise unemployed person to work. Given the comprehensive nature of the ABC Test, however, such applications may be dif-

103. See *Me. Unemployment Ins. Comm'n*, No. 92-E-65 (May 19, 1993) (client company leasing employees from employee-leasing company required to pay contributions assessed despite fact that amounts were paid by client to leasing company, which failed to remit payment to Department of Labor); *Me. Unemployment Ins. Comm'n*, No. 92-E-127 (Mar. 22, 1993) (equity argument of undue burden placed on domestic employers and workers was dismissed as unpersuasive and beyond authority of MUIC).

104. See *Me. Unemployment Ins. Comm'n*, No. 91-E-131 (Sept. 4, 1992) (MUIC declined to interpret exemption at *ME. REV. STAT. ANN.* tit. 26, § 1043(11)(F)(33) (West 1988) as exempting entertainers who act as their own agents).

105. Interview with John B. Wlodkowski, Esq., Chairman of the MUIC, in Portland, Me. (Nov. 9, 1993).

ficult or may result in strained interpretations in particular cases.

For example, in one case,¹⁰⁶ the MUIC ruled that the services of a roofer/drywaller and a carpenter/concrete worker did not constitute "employment" under the ABC Test when the putative employer was the general contractor on a residential construction job. The general contractor was a corporation customarily engaged in installing interior finish trim in newly-built buildings in Florida. Because of the depressed construction market, the corporation agreed to accept the job of building an entire residence in Eustis, Maine. After finding that the services of the two workers met the first and third prongs of the ABC Test on fairly straightforward, traditional grounds, the MUIC ruled that, although the services were performed at the employer's place of business (the construction site), the services were outside of the employer's "usual" course of business.¹⁰⁷ MUIC found that the employer's usual course of business was the installation of interior finish trim. As a result, virtually all of the building construction activities at the site were outside the scope of its usual course of business.

In another case,¹⁰⁸ the MUIC found that the services performed by a free-lance editor for a publishing company met all of the conditions of the ABC Test. In that case, the worker held a Ph.D. in botany and had performed the services at issue for many years for several publishers. The employer provided him with new office equipment and telephone lines as well as business cards imprinted with the employer's name. Finally, the employer required that the worker not perform similar services for its direct competitors. Despite these facts, the MUIC ruled that the worker was free from direction and control,¹⁰⁹ that the work was within the employer's usual course of business but was performed outside all of its places of business,¹¹⁰ and that the worker was independently established in his

106. Me. Unemployment Ins. Comm'n, No. 91-E-108 (Mar. 23, 1992).

107. *Id.* The workers set their own hours, achieved the desired results absent direction and control over the means and methods for accomplishing them, advertised or made it known that they performed the services for the public, and had a proprietary interest in businesses which they could operate without hindrance from any source. *Id.*

108. Me. Unemployment Ins. Comm'n, No. 91-E-100 (Aug. 31, 1992).

109. *Id.* Worker set his own hours, means of accomplishing desired results not subject to control, and worker used his own judgment in complying with restriction on work for direct competitors. *Id.*

110. *Id.* Worker's preexisting home office was not converted to a place of business of the employer simply due to upgraded furnishings and equipment. Also, employer's business was not dependent on geographic coverage or on any particular locations, thus the "business territory" analysis (*see supra* note 73) and job site criteria (*see supra* note 74) were found to be inappropriate in this case. Me. Unemployment Ins. Comm'n, No. 91-E-100 (Aug. 31, 1992). Compare this analysis with *Jose v. Maine Dep't of Labor*, No. CV-84-351 (Me. Super. Ct., Ken. Cty., May 20, 1985) (Clifford, J.) (allowing MUIC finding that knitters' homes were an extension of employer's

own business.¹¹¹

In the first case above, the MUIIC weighed as a factor in its decision the depressed construction industry, and in the second case, it considered the worker's self-characterization as an independent contractor engaged in a distinct occupation. Consideration of these factors is not unprecedented.¹¹²

In short, an employer attempting to structure a relationship with a worker so as to avoid liability for unemployment compensation contributions must be very careful. If the worker is an employer in his or her own right, there is usually no difficulty.¹¹³ In this instance, contributions are paid by the worker himself or herself. Also, the establishment of a partnership or joint venture can effectively avoid liability for contributions.¹¹⁴ In that instance, the parties have freely chosen and agreed jointly to seek profits and share in losses—they are, in essence, self-employed.¹¹⁵ Although carefully worded con-

place of business to stand).

111. Me. Unemployment Ins. Comm'n No. 91-E-100 (Aug. 31, 1992). Worker performed editorial services for several other publishers and was not dependent upon employer's contract for his livelihood. *Id.*

112. In *Maine Unemployment Compensation Comm'n v. Maine Sav. Bank*, 3 A.2d 897 (Me. 1939), the Law Court considered prevailing economic conditions as a factor in its decision:

A slump, all but catastrophic in every state of the union, and terrific in Maine, followed by depression, recession and their spawn, in the fountains of investment in the business of banking, has justified the belief which we entertain that no legislature in our history ever intended that the business of a savings bank should include the real estate business.

It follows that contracting for "repairs, improvements and alterations to such parcels of real estate [acquired through foreclosures]" . . . is not contracting "for any work which is part of [Maine Savings Bank's] usual trade, occupation, or business"

Id. at 899.

In *American Consulting Corp. v. United States*, 454 F.2d 473 (3d Cir. 1971), steel consultants engaged by an American corporation to perform services for steel manufacturers abroad were found not to be employees of the contracting corporation, which was viewed as a specialized employment agency, *id.* at 484, but rather to be engaged in a distinct occupation. Similarly, persons known as "gypsy chasers," used in the trucking industry for loading and unloading trucks, who were paid on a per job basis and were provided with no tools or equipment were found, in *Bonney Motor Express, Inc. v. United States*, 206 F. Supp. 22 (E.D. Va. 1962), to be engaged in a distinct trade which negated the existence of an employer-employee relationship. The court said that Congress did not intend for the workers to have "more employers than a dog had fleas." *Id.* at 30.

113. Under ME. REV. STAT. ANN. tit. 26, § 1043(10) (West 1988), an employer is not deemed to employ individuals working for its contractors or subcontractors when those contractors or subcontractors are themselves subject employers.

114. See *Nancy W. Bayley, Inc. v. Maine Employment Security Comm'n*, 472 A.2d 1374, 1378 (Me. 1984) (determining that the parties engaged in a joint venture negates applicability of the ABC Test).

115. See *Ham v. Maine Employment Security Comm'n*, 216 A.2d 866, 869 (Me. 1966) ("A self-employed person . . . meets all of the criteria to remove his self-em-

tracts drawn expressly for the purpose of making the worker an independent contractor are acceptable in some jurisdictions,¹¹⁶ such an attempt is not likely to withstand the scrutiny of Maine courts.¹¹⁷ The problem lies in the inconsistency of decisions and raises questions of reasonableness and predictability.

This leads to the question of whether the ABC Test, as interpreted and applied, has contributed to the achievement of the purposes for which the Maine Employment Security Law was enacted: achievement of social security; prevention of the spread of unemployment; alleviation of its burden on the unemployed worker, his or her family, and the entire community; maintenance of purchasing power; and promotion of the use of the highest skills of unemployed workers.¹¹⁸ On the one hand, the ABC Test is a shield by which workers may protect themselves from the coercion, undue pressure, and unequal bargaining power of employers wishing to minimize labor costs while exploiting the unfortunate situation of the unemployed worker. On the other hand, the ABC Test can create a heavy burden on small business by substantially increasing its labor costs. It also creates a burden for truly "independent contractors" who might not find work due to employers' fear of unemployment contribution liability determined long after the services have been fully performed to the satisfaction of the parties. The more onerous the burden of the ABC Test, the less willing the employer will be to create jobs or to contract with "independent" workers.

The Maine Employment Security Law was enacted as remedial legislation intended to ameliorate the hardship caused to the indi-

ployment service from the definition of 'employment' . . ."). See also Me. Unemployment Ins. Comm'n Rules Governing the Administration of the Employment Security Law, ch. 9, § 3 (Oct. 2, 1989), to the effect that a self-employed person is not able and available to accept full-time work under ME. REV. STAT. ANN. tit. 26, § 1192(3) (West 1988).

116. In *Rochester Dairy Co. v. Christgau*, 14 N.W.2d 780 (Minn. 1944), the Minnesota Supreme Court described such a contract between a dairy company and its haulers as:

[A]n admirable piece of draftsmanship. It is expressed in clear, simple, definite language, free from ambiguity. There is no excuse for the court to read into it anything that is not there. . . . Nor can there be any question that the contract was drawn for the express purpose of making the hauler an independent contractor. This was a lawful purpose [and] such a relation is not against public policy. . . . [T]he result was not a case where one who is an employee in fact has been persuaded to sign away his statutory rights. . . . [T]he legislature did not intend to destroy the right of competent parties to negotiate and perform contracts of this type.

Id. at 781.

117. *Maine Unemployment Compensation Comm'n v. Androscoggin Junior, Inc.*, 137 Me. 154, 162, 16 A.2d 252, 257 (1940) ("Surely the Legislature would not be powerless to avoid this rather obvious type of evasion. Assuming the statute as a whole is valid, any provision reasonably designed to avoid possible evasion is justified.").

118. ME. REV. STAT. ANN. tit. 26, § 1042 (West 1988).

vidual and the community by unemployment.¹¹⁹ Such legislation traditionally is “based upon a philosophy that employment and not unemployment is the goal to be attained.”¹²⁰ “It is not the direct or primary propose of such legislation to control or regulate the relationship of employer and employee.”¹²¹

Some state courts have been inappropriately activist in applying the ABC Test. The New Jersey Supreme Court, in a recent case,¹²² applied that state’s ABC Test¹²³ to carpet installers who worked under contract with a carpet warehouse (the putative employer). In holding that the carpet installers were independent contractors, the court first looked to one of the consequences of classifying a worker as an “employee”:

[O]ne who is classified an employee rather than an independent contractor may collect unemployment benefits, if otherwise eligible and not otherwise disqualified Thus, the ABC test is used not only to determine those employers and employees that are obligated to pay unemployment compensation taxes but also as one of the standards of eligibility to determine those workers eligible to receive unemployment benefits.¹²⁴

The court noted that the state legislature, since the enactment of unemployment compensation legislation, had continually expanded the number of exemptions from the definition of employment.¹²⁵ The court reasoned that the legislature had evinced a clear intent to include under the term “employment” only those individuals who may someday be eligible for benefit payments.¹²⁶ The court declared, “[o]ne should not be required to make unemployment contributions unless one realistically could be eligible to collect benefits.”¹²⁷

The court realized that under a strict application of the ABC Test, even self-employed persons may not satisfy one of the standards of the ABC Test.¹²⁸ The court believed that such a result con-

119. See *supra* note 24.

120. 81 C.J.S. *Social Security* § 147 (1977).

121. *Id.*

122. *Carpet Remnant Warehouse, Inc. v. New Jersey Dep’t of Labor*, 593 A.2d 1177 (N.J. 1991).

123. N.J. STAT. ANN. § 43:21-19(i)(6) (West 1991 & Supp. 1994).

124. *Carpet Remnant Warehouse, Inc. v. New Jersey Dep’t of Labor*, 593 A.2d at 1185.

125. *Id.* at 1188.

126. *Id.*

127. *Id.*

128. For example, an independent, self-employed carpenter performing services for another carpenter at the second carpenter’s job site is performing services that are neither outside the usual course of business nor outside all of the places of business of the second carpenter. Thus, the business course/place prong of the ABC Test is not met, and the first carpenter is deemed to be the employee of the second.

flicted with the legislative purpose.¹²⁹ To reconcile this result, the court entered into a construction of the ABC Test that emphasized the third prong (customary independence) over the first two prongs (ability to direct and control; business course/place). The court said:

[T]he C standard provides the closest connection between the obligation to pay taxes and the eligibility for benefits. . . . [T]he statutory A and B standards . . . are not necessarily consistent with a person's realistic eligibility for benefits. . . . [I]t would be inappropriate for the Commissioner to apply the A or B tests restrictively and mechanically if their applicability is otherwise uncertain.¹³⁰

The Maine courts have properly avoided such judicial activism in construing Maine's ABC Test.¹³¹

V. PROPOSALS FOR REVISION

The Maine Legislature has continually adopted more and more exemptions from the statutory definition of "employment."¹³² Some were adopted in response to FUTA revisions, but others clearly reflect the legislature's intent to exclude from the term "employment" those services performed by individuals who, in all likelihood, will never be eligible to receive unemployment benefits.¹³³ The legislature has also responded to calls from employers, who would go out of business due to their unwillingness or inability to sustain the expense of unemployment contributions. Considering the statute's remedial nature, legislation by exemption is less appropriate than adoption of an accurate statement of principle and policy.

Of course, certain types of employment should not be exempt from the payment of unemployment contributions solely because workers in that field may not be eligible for unemployment benefits.¹³⁴ Nor should any group of employers be permitted to control

129. *Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor*, 593 A.2d at 1185.

130. *Id.* at 1189.

131. In fact, the New Jersey Supreme Court recognized that the resolution of a potentially anomalous result of the ABC Test's application in a particular circumstance (i.e., a common law "independent contractor" being treated as a statutory "employee" for contribution purposes) was for the legislature and not the courts, yet it nevertheless subordinated the first two prongs of ability to direct and control and business course/place to the third prong of customary independence. *Id.*

132. See ME. REV. STAT. ANN. tit. 26, §§ 1043(11)(F)(1)-(36) (1988 & Supp. 1993-1994).

133. Reasons for ineligibility vary from case to case, but may include inability or unavailability to accept full-time work. ME. REV. STAT. ANN. tit. 26, § 1192(3) (West 1988). This is the primary reason that students, homeworkers with child care responsibilities, and self-employed persons are ineligible for unemployment benefits. See also Me. Unemployment Ins. Comm'n Rules Governing the Administration of the Employment Security Law, ch. 9 (1989) (explicating the "able and available" criteria and the self-employment restriction on eligibility).

134. Some judges, for example, have life tenure while others do not. See *Carpet*

the social security of the labor force merely because payment of contributions is an expense of the employer. These factors alone are neither controlling nor entirely persuasive. They are, however, legitimate factors to be weighed in crafting a public policy that benefits those intended to be benefitted while not unnecessarily burdening the remainder of the work force and the commercial marketplace.

"[I]t is the purpose of [unemployment compensation] legislation to benefit only employees who are out of work because their employer, or industry generally, is unable, for reasons beyond the employees' control, to provide work."¹³⁵ The employer's, or the industry's, "inability" to provide work should not, however, be caused by the burdens of statutory schemes which tend to create unemployment, rather than foster expansion of employment opportunities. Maine is one of twenty jurisdictions in the United States that includes a traditional ABC Test in its unemployment compensation legislation.¹³⁶ Another thirteen have no form of the ABC Test and rely solely on the common law principles of master and servant.¹³⁷ In addition, five jurisdictions have statutes which include only the

Remnant Warehouse, Inc. v. New Jersey Dep't of Labor, 593 A.2d at 1192 (O'Hern, J., dissenting) ("The perfectly congruent symmetry sought by the majority assumes a perfection of analysis that is required by neither constitutional principle nor by the structure of the statute. That some members of the burdened class do not benefit from the system does not render the classification arbitrary.").

135. 81 C.J.S. *Social Security* § 149 (1977).

136. ALASKA STAT. § 23.20.525(a)(10) (1990); CONN. GEN. STAT. ANN. § 31-222(a)(1)(B)(I, II & III) (West Supp. 1994); DEL. CODE ANN. tit. 19 § 3302(9)(K) (1985); GA. CODE ANN. § 34-8-35(f) (Michie Supp. 1993); HAW. REV. STAT. § 383-6 (1985); ILL. ANN. STAT. Ch. 820, para. 405/212 (Smith-Hurd 1993); LA. REV. STAT. ANN. § 23:1472(12)(E) (West 1985); ME. REV. STAT. ANN. tit. 26, § 1043(11)(E) (West 1988); MD. CODE ANN., Labor & Emp't § 8-205 (Michie 1991); MASS. GEN. LAWS ANN. ch. 151-A, § 2 (West Supp. 1994); NEB. REV. STAT. § 48-604(5) (1988 & Supp. 1993); NEV. REV. STAT. ANN. § 612.085 (Michie 1992); N.H. REV. STAT. ANN. § 282-A:9 (III) (1987); N.J. STAT. ANN. § 43:21-19(i)(6) (West Supp. 1994); N.M. STAT. ANN. § 51-1-42(F)(5) (Michie 1993); R.I. GEN. LAWS § 28-42-7 (Michie 1986); TENN. CODE ANN. § 50-7-207(e)(1) (1991 & Supp. 1993); VT. STAT. ANN. tit. 21, § 1301(6)(B) (1987 & Supp. 1993); WASH. REV. CODE ANN. § 50.04.140(1) (West 1990 & Supp. 1993-1994); W. VA. CODE § 21A-1-3 (Michie 1989 & Supp. 1993).

137. ALA. CODE §§ 25-4-7 and 25-4-10(a)(1)(b) (Michie 1992 & Supp. 1993); ARIZ. REV. STAT. ANN. § 23-613.01(A-C) (1983); ARK. CODE ANN. § 11-10-210(a)(1)(B) (Michie 1987 & Supp. 1993); CAL. UNEMP. INS. CODE § 621(b) (West 1986); D.C. CODE ANN. § 46-101(2)(A)(i)(II) (1990); FLA. STAT. ANN. § 443.036(19)(a)(1)(b) (West Supp. 1993); KY. REV. STAT. ANN. § 341.050(1)(a) (Michie/Bobbs-Merrill 1990); MINN. STAT. ANN. § 268.04.12 (West 1992 & Supp. 1994); N.C. GEN. STAT. § 96-8(6)(a) (1993); N.D. CENT. CODE § 52-01-01(17)(e) (Supp. 1993); S.C. CODE ANN. § 41-27-230(1)(b) (Law. Co-op. 1986); UTAH CODE ANN. § 35-4-22.3(3)(a-t) (Supp. 1993). In New York, the statute presumptively defines employment with no reference to the common law. N.Y. LAB. LAW § 511(1)(a) (McKinney 1988 & Supp. 1993). New York case law looks to the common law principles of master and servant. *Claim of Mikulski*, 90 A.D.2d 633, 456 N.Y.S.2d 213 (1982).

ability to direct and control prong.¹³⁸ One jurisdiction has adopted only the ability to direct and control and the business course/place prongs of the test,¹³⁹ and eight jurisdictions use only the ability to direct and control and the customary independence prongs.¹⁴⁰ The remaining four jurisdictions have enacted some modification of an ABC Test. In two, the second prong of the test covers only the course of business but does not include the place of business alternative.¹⁴¹ In the other two, the prongs of the ABC Test itself are traditional, but the first prong is conjunctive with either the second or the third.¹⁴² That is, the employer, to escape contribution liability, must show that the services at issue are free from its direction and control and that they are *either* outside of the usual course/all places of its business *or* performed by an individual who is independently established in business.

For those jurisdictions that include only part or a modification of the ABC Test, all but one have omitted or in some way modified the business course/place prong. There is available relatively little case law focusing on the second prong's requirements. The few cases that do exist are often irreconcilable.¹⁴³ One court has stated, "[F]or a person to satisfy the B standard's second alternative would be practically impossible" if places of business were to include job sites other than the employer's physical plant and other places where it "conducts an integral part of its business."¹⁴⁴ The common law treated the second prong's two alternative factors as pertinent, but not controlling, in determining whether an individual was an em-

138. IOWA CODE ANN. § 96.19(18)(f) (West Supp. 1994); MICH. COMP. LAWS ANN. § 421.42(5) (West 1978); MISS. CODE ANN. § 71-5-11(I)(14) (1989 & Supp. 1992); MO. ANN. STAT. § 288.034.5 (Vernon 1993); TEX. LAB. CODE ANN. § 201.041 (West Supp. 1994) (Because of the common law reliance on control as the primary factor in determining the employer-employee relationship, these five states, which have accepted a statutory control test, may be considered along with the thirteen common law states listed in the preceding note.)

139. KAN. STAT. ANN. § 44-703(i)(3)(D)(i & ii) (1993).

140. COLO. REV. STAT. § 8-70-115(1)(b) (Supp. 1993); IDAHO CODE § 72-1316(d)(1)(A & B) (Supp. 1993); MONT. CODE ANN. § 39-51-201(14) (1993); OR. REV. STAT. § 657.040(1)(b & c) (1993); PA. STAT. ANN. tit. 43, § 753(l)(2)(B)(a & b) (1992); S.D. CODIFIED LAWS ANN. § 61-1-11(1 & 2) (1993); WIS. STAT. ANN. § 108.02(12)(b) (West 1988); WYO. STAT. § 27-3-104(b)(i & iii) (Supp. 1993).

141. IND. CODE ANN. § 22-4-8-1(a)(A, B & C) (Burns 1992); OHIO REV. CODE ANN. § 4141.01(B)(1)(b) (Baldwin 1990 & Supp. 1993).

142. OKLA. STAT. ANN. tit. 40, § 1-210(14)(a, b & c) (West Supp. 1993); VA. CODE ANN. § 60.2-212(C)(1 & 2) (Michie 1992).

143. Compare *Superior Life, Health, and Accident Ins. Co. v. Board of Review*, 23 A.2d 806, 808 (N.J. 1942) (court found business of enterprise located wherever services are performed) with *Florida Indus. Comm'n v. State*, 21 So. 2d 599 (Fla. 1945) (court rejected argument that bulk stations owned by oil company and at which operators performed services at issue were place of business of oil company).

144. *Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor*, 593 A.2d 1177, 1190 (N.J. 1991).

ployee or an independent contractor.¹⁴⁵ By codifying those factors as one prong of a conjunctive test, the legislation elevated the factors from considerations to requirements.

There is only one Maine case decided solely on the second prong of the test.¹⁴⁶ The dearth of case law on the business course/place prong over nearly sixty years of deciding ABC Test cases reflects the Law Court's preference for deciding ABC Test cases on the more relevant first and third prongs. It also demonstrates the impropriety of determining the employer-employee relationship based on the business course/place prong alone.

There is significant overlap between the first and third prongs of the ABC Test. Independent contractor services are generally free from another's control or direction precisely because the contractor is established as an independent business. Similarly, one factor in the determination of whether an individual is independently established in a business is the degree to which he or she is free from control or direction as to the performance of the services. Further, when an individual is subject to another's control or direction, including the means and methods for accomplishing the desired result, a finding of customary independence may not be precluded.

If an individual is engaged in an independently established trade, occupation, profession, or business, no purpose is served by requiring that contributions be paid by the "customers" who hire that person. Moreover, the independent worker would not be eligible to collect unemployment benefits in any event because of a failure to meet the "able and available" eligibility criteria.¹⁴⁷ A burden has been imposed on the commercial marketplace with no corresponding benefit.

Maine currently faces poor economic prospects and continues to face high levels of unemployment. It seems appropriate that the legislature take steps to decrease the tax burden on employers and begin to provide an environment where individual entrepreneurial initiative is not hindered by state regulation. To this end, the ABC Test should be narrowed to include fewer "independent contractor" relationships. Carefully considered revisions would result in no less protection for legitimate employees against employer coercion.

Eliminating the second prong of the ABC Test would accomplish this narrowing. An employer would not be required to pay unem-

145. *Id.* at 1186.

146. *Gerber Dental Ctr. Corp. v. Maine Unemployment Ins. Comm'n*, 531 A.2d 1262 (Me. 1987). In *Gerber Dental Center*, the court upheld the MUIC's application of the ABC Test. Finding neither alternative of the business course/place prong satisfied, the court did not discuss the remaining two prongs, since all three prongs are conjunctive. The MUIC, however, found none of the three prongs to be satisfied, *id.* at 1263, and the court may have simply affirmed through the path of least resistance: the catch-all business course/place prong.

147. ME. REV. STAT. ANN. tit. 26, § 1192(3) (West 1988). See also *supra* note 128.

ployment contributions for services performed free from his or her direction and control by an independent business person simply because the services are in the same course of business and are performed at one of his or her places of business.

Two recent MUIC cases are instructive.¹⁴⁸ In the first case, the services of a drywaller performed for the employer, a general contractor and real estate developer, at its new construction sites satisfied all three prongs of the ABC Test.¹⁴⁹ A majority of the MUIC found that the drywaller's services were performed at the employer's places of business, but were outside of its usual course of business. The MUIC reached this result notwithstanding the fact that some of the employer's regular employees installed drywall in its existing rental properties during renovation.¹⁵⁰ The MUIC majority said that "the quality differential between the drywall services performed by the [employer's] employees and those performed by this drywaller was sufficient to remove these services from what may be termed the [employer's] 'usual' course of business."¹⁵¹

The second case addressed services performed by drywall hangers for an employer who contracted for drywall jobs. The employer contracted out the drywall hanging to independent hangers rather than hanging drywall with its own employees. The employer's employees then prepared and finished the hung drywall. The MUIC found that the hangers were independently established in business and that they were free from any right of direction and control by the employer.¹⁵² Thus, the first and third prongs of the ABC Test were satisfied. With respect to the business course/place prong, the MUIC majority found that the hangers' services were not outside the employer's usual course of business, notwithstanding the fact that the employer virtually never hung any drywall itself.¹⁵³

The MUIC found that "classifying sheetrock hangers in a different course of business than tapers, mudders, sealers, and sanders is an artificial distinction. The true course of business here at issue is 'drywall services.'"¹⁵⁴ The MUIC majority rejected the employer's arguments concerning distinctions made by the Workers Compensation Commission, union halls, and federal minimum wage laws.¹⁵⁵ It distinguished the general contractor case discussed above on the basis that it involved distinct professions within an industry, not incre-

148. See Me. Unemployment Ins. Comm'n, No. 92-E-186 (Dec. 1, 1993); Me. Unemployment Ins. Comm'n, No. 92-E-195 (Dec. 10, 1993).

149. Me. Unemployment Ins. Comm'n, No. 92-E-186 at 5.

150. *Id.* at 4.

151. *Id.*

152. Me. Unemployment Ins. Comm'n, No. 92-E-195 at 4,6.

153. *Id.* at 4.

154. *Id.*

155. *Id.*

mental tasks within a single profession.¹⁵⁶

In both cases the services at issue were free from the employers' control and direction and were performed by independent, self-employed workers who would be ineligible to receive unemployment benefits by virtue of their self-employment. What, then, is the purpose of taxing the second employer and not the first? Removing the business course/place prong from the ABC Test would avoid this anomalous result. It would, in fact, remove a significant burden on the construction industry as a whole. General contractors would no longer be caught by surprise to learn that they have to pay contributions for all of the "independent" carpenters engaged for the prior four years. Nor would they have to increase their prices in order to cover the expense of unemployment contributions. In addition, independent carpenters, for example, would be able to find additional work with general contractors who would otherwise hire only carpentry firms, which are themselves employers, in order to avoid liability for contributions.¹⁵⁷

At the same time, bona fide employees would lose none of the protections currently embodied in the ABC Test. If an employer coerced a worker into signing a contract which classified the worker as an "independent contractor," contributions could still be assessed against the employer. The revised test would still look to what happens in fact, and the employer could not show that the employee was in fact established as an independent business. All of the factual considerations which affect an employer's liability for unemployment contributions under the first and third prongs of the test would remain. The second prong adds little to an analysis of the employer-employee relationship, which should rest on the independence of the worker and his or her freedom from control or direction.

Eliminating the business course/place prong need not jeopardize the stability of the Unemployment Compensation Fund into which employer contributions are accumulated. The fund would suffer no significant reduction in contributions. The vast majority of all services performed for remuneration would remain taxable as "employment." Those services affected are primarily found in particular industries that rely heavily on contract labor, and then only those performed by truly independent contractors. Moreover, by removing an existing burden on employers and sole-proprietor contractors, the revision allows for an expansion of work available to "independent contractors." The removal of this burden might well create an incen-

156. *Id.* at 5.

157. Elimination of the business course/place prong of the test would also avoid the question of the appropriateness of applying the ABC Test to domestic services. There would no longer be an issue as to what is a homeowner's course or place of business.

tive for entrepreneurship on the part of workers, thus stimulating the economy. Further, it is equitable to spread the burden of funding unemployment benefits only among those employers whose employees may later draw from that fund. Employers whose workers are self-employed individuals do not create unemployment and ought not to be taxed.

Historical reliance on legislative exemption in specific cases would not be useful in this context for several reasons. First, the wide variety of possible types of services affected by the proposed revision is not conducive to a single exemption. There already exist at least thirty-seven specific exemptions. Social security legislation should be proactive rather than reactive, which is the essence of the exemptions already enacted. Second, a blanket exemption would sweep too broadly and remove from coverage those individuals performing services as employees along with those self-employed individuals performing similar services. Finally, narrowly crafted exemptions have the tendency to be too narrow. For example, an exemption for hairdressers holding booth licenses and operating under booth rental agreements¹⁵⁸ was too narrow to exempt barbers holding similar booth licenses and operating under booth rental agreements. An exemption for barbers was enacted two years later.¹⁵⁹ Similarly, an exemption for homeworkers in the knitted outerwear industry¹⁶⁰ was held by the MUIC to be too narrow to exempt homeworkers employed as stitchers to assemble non-knitted outerwear.¹⁶¹

An alternative proposal for revising the ABC Test would be to subordinate the first and second prongs of the test to the third and make the second prong conjunctive. Under this proposal, a determination that the worker is independently established in business would be dispositive of the ultimate issue of employer liability. On the other hand, if an employer could not show that the worker was independently established (e.g., the worker had only just embarked upon a course of independence but had not yet become established), then liability could be avoided only by showing that the worker was free from direction and control *and* that the services were performed outside of both the employer's usual course and all the places of its business.

This proposal is somewhat similar to the approach taken by those states that have made the first prong of the ABC Test conjunctive with either the second prong or the third prong. The proposal, however, has the advantage of removing liability in cases where the

158. ME. REV. STAT. ANN. tit. 26, § 1043(11)(F)(29) (West 1988), enacted by P.L. 1973, ch. 471.

159. ME. REV. STAT. ANN. tit. 26, § 1043(11)(F)(30) (West 1988), enacted by P.L. 1975, ch. 217.

160. ME. REV. STAT. ANN. tit. 26, § 1043(11)(F)(35) (West 1988).

161. Me. Unemployment Ins. Comm'n, No. 92-E-205 (Aug. 11, 1993).

worker is established in a bona fide independent business but because of the nature of the services, direction and control is present to some degree. For example, a contract salesperson may be independently established selling products for a number of manufacturers. Yet each manufacturer may prescribe that certain sales contract forms be used for its products or that certain terms for installment sales are not acceptable. In this situation, the salesperson will not be eligible to collect unemployment benefits if one, or several, of the manufacturers no longer uses his services, since he is still self-employed and has other manufacturers' products to sell. Each manufacturer should not be held liable for unemployment contributions on the sales commissions.

The same arguments raised against the first proposal (protection of workers, stability of the Unemployment Compensation Fund, and enactment of specific exemptions) could be leveled against this second proposal for revision. They would be countered by the same rebuttals: protection of workers is not reduced by the proposed revision; stability of the fund is not a serious threat; and proactive revision is more equitable and better suited to address the issues raised than reactionary exemption. Either proposal would produce the desired results. The inequitable and counterproductive situation caused by the statute as it exists should be addressed by the legislature so that undue burdens may be lifted and economic development and entrepreneurial initiative may be encouraged.

VI. CONCLUSION

Unemployment compensation legislation has a long and complex history, at both the federal and state levels. Case law is not consistent across jurisdictions, and sometimes even within a jurisdiction. In Maine, the Employment Security Law contains an ABC Test which deems all services performed for remuneration to be employment subject to unemployment contributions by the employer unless the employer can show that three specific factors relating to the relationship between the employer and the worker simultaneously exist. The Maine courts have decided that the ABC Test sweeps broader than the common law principles of master and servant. In attempting to meet the conditions of the test, employers bear a heavy burden. This burden, in turn, has had a negative effect in addressing the unemployment problem. While more workers may be eligible for unemployment benefits, more workers remain unemployed. Employers forego hiring and business expansion to avoid liability for contributions and refuse to hire sole-proprietor workers who have established their own businesses. Thus, the commercial marketplace is burdened without a corresponding benefit to the system as a whole. The courts have appropriately left it to the legislature to alter the statute to fulfill the social security purposes of un-

employment compensation. Considering the present unfavorable economic conditions existing in this state and the lack of optimistic projections in the foreseeable future, the legislature should attempt to spark economic improvement by removing onerous burdens from employers, thus creating opportunities for unemployed or underemployed individuals. One way to do this would be to revise the ABC Test to alleviate some of the expenses of employing independent contractors while at the same time retaining the safeguards necessary to protect bona fide employees.

Christopher J. Cotnoir